

United States District Court
Southern District of New York

GUY LAURENT,

10 Civ. 4055 (JGK)

Plaintiff,

MEMORANDUM OPINION AND
ORDER

- against -

G & G BUS SERVICE, INC., ET AL.,

Defendants.

JOHN G. KOELTL, District Judge:

The Court has reviewed the Report and Recommendation of Magistrate Judge Smith dated May 17, 2011. The plaintiff has filed Objections to that Report and Recommendation and the Court has considered the portions objected to de novo. Only defendant Russell Kamer has responded to the Plaintiff's Objections.

The Magistrate Judge's Report and Recommendation is well reasoned and correct, and for the reasons explained in the Report, the Court adopts it. Several objections warrant brief comment. While the plaintiff asserts that the Magistrate Judge should have considered the motions to dismiss as motions for summary judgment, the Magistrate Judge appropriately treated the motions as motions to dismiss and appropriately considered only statements or documents incorporated into the complaint by reference, matters of which judicial notice may be taken, and documents possessed by or known to the plaintiff and upon which

the plaintiff relied on in bringing suit. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). While the plaintiff repeats his conclusory allegations that he was discriminated against in violation of the Age Discrimination in Employment Act and the Americans with Disabilities Act and that he was retaliated against in violation of those statutes and Title VII, he has failed to go beyond conclusory allegations that do not state plausible claims for violation of those statutes.

The Magistrate Judge recommended that the plaintiff's federal claims be dismissed with prejudice for failure to state a claim and that the state law claims be dismissed without prejudice based on the denial of supplemental jurisdiction. The Magistrate Judge also recommended the denial of the plaintiff's motion for a default judgment against First Students, Inc., a recommendation to which the plaintiff has not objected. While the Magistrate Judge recommended denial of the plaintiff's request to amend because of the failure to submit a proposed amended complaint, the Magistrate Judge recommended that the denial be without prejudice to the plaintiff's ability to file a formal motion to file an amended complaint. That will allow the plaintiff to submit a proposed amended complaint and allow the defendants to either oppose that motion and explain why the proposed amended complaint is insufficient or consent to the

filing of the proposed amended complaint without prejudice to any motion to dismiss that proposed amended complaint. That is a reasonable recommendation by the Magistrate Judge. The plaintiff should only be afforded the opportunity to file an amended complaint if he has an amended complaint that is not futile. This necessarily means that while the federal claims are dismissed "with prejudice," they can be revived if the plaintiff is able successfully to move to file an amended complaint that states plausible federal claims. If the plaintiff can present such a complaint, then the state law claims can also proceed because the court would exercise supplemental jurisdiction over them. To the extent that Dr. Kramer has asked the court to dismiss the state law claims with prejudice, that request is denied because it was not the basis for an objection to the Magistrate Judge's Report and Recommendation, but was in response to the objections filed by the plaintiff and is therefore an untimely objection.

Finally, given the timing of FSI's retention of counsel, its filing of its motion to dismiss, and the plaintiff's motion for default judgment, the Court agrees with the Magistrate Judge's recommendation that the plaintiff's motion for entry of default judgment against defendant FSI be denied.

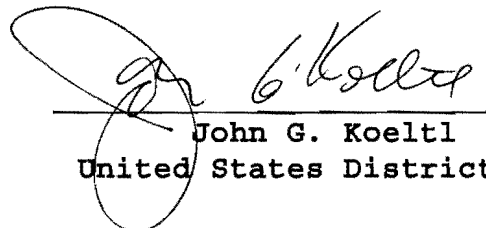
CONCLUSION

For the reasons explained above, the Court adopts the Report and Recommendation of Magistrate Judge Smith. The defendants' motions to dismiss are granted. The plaintiff's federal law claims are dismissed for failure to state a claim. The plaintiff's motion for leave to replead is denied without prejudice to filing a formal motion that includes a copy of the proposed amended pleading. If the plaintiff does not file such a motion by **July 29, 2011**, or if the defendants successfully oppose that motion or obtain dismissal of an amended complaint, all federal claims shall be dismissed with prejudice. The plaintiff's state law claims are dismissed without prejudice to refile in state court or in an amended complaint. The plaintiff's motion for a default judgment against defendant FSI is denied.

The Clerk is directed to close all pending motions and objections.

SO ORDERED.

**Dated: New York, New York
July 8, 2011**



**John G. Koeltl
United States District Judge**